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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 194.

C. V. BROWNE, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR RESPONDENT

STATEMENT OF FACTS

This action was brought to recover damages sustained by reason of alleged reliance placed upon the datings of four shipper's order bills of lading issued by the respondent, which datings it was alleged were erroneous.

Petitioner, a Texas grain dealer, alleged (Tr., p. 3) that he had entered into a written contract to purchase 10,000 bushels of wheat from the Ed Past Grain Company, of Denver, which was to be shipped on or before a specified date. That he thereafter entered into a written contract to sell to the Gladney Milling Company, another Texas grain dealer, 5,000 bushels of the wheat, to be shipped on or before the same date specified in the first contract, delivery to be made in Texas. The Ed Past Grain Company, vendor under the first contract, presented to the petitioner for payment four sight drafts, to which were attached four ship-

per's order bills of lading, each reciting receipt of a carload shipment of wheat by the respondent at Denver. Petitioner paid the drafts and received the bills of lading which had been issued and signed by respondent's agent, and he alleges he would not have done this had not the bills of lading shown by their dating that the shipments had been made within the time specified in the two contracts he had previously entered into. That he thereafter tendered the four bills of lading to the Gladney Milling Company, in accordance with the terms of the second contract, but that acceptance was declined by the latter on the ground that the bills of lading were incorrectly dated and that the wheat had not been shipped as they represented on or before the dates specified in the contracts. That as a result, petitioner was compelled to sell the wheat at a loss, to his damage; the damages claimed being the difference between the price specified in the contract with the Gladney Milling Company, and the price for which the wheat was actually sold on the open market, with demurrage charges added and freight charges deducted.

Petitioner further alleged that before he learned of the incorrect datings, the Ed Past Company became insolvent and that he was damaged by reason of the fault of petitioner in issuing incorrect order bills of lading which were negotiated by him for value and upon which he placed reliance without knowledge of their incorrectness, when he became the lawful holder thereof.

The petitioner set up as exhibits attached to his petition below exact copies of two contracts covering the sale and purchase of the grain in question. The contract between petitioner and the Ed Past Grain Company contained (Tr., p. 14) the provision:

> "Grain not shipped within specified time, contract will be considered open until shipped, unless we have been advised the same has been cancelled."

The petitioner did not allege that he had, prior to the time of shipment, cancelled the contract.

Respondent's answer (Tr., p. 9) admitted the execution of the contracts but set up the following defenses:

"Second: That under the terms of the contract between petitioner and the Ed Past Grain Company the former was bound to accept the shipments regardless of the dating of the bills of lading, no allegations having been made by petitioner that any notice of cancellation had been given the Ed Past Grain Company prior to the time of shipment.

"Third: That respondent at no time had any knowledge of any contracts between petitioner and others either specific or by reason of custom or usage and that it did not and could not know any special reliance would be placed by any one on the dating of the bills of lading.

"Fourth: That if the bills of lading were misdated this was done by the Ed Past Grain Company who filled in the customary forms presenting them to the respondent during the rush of business for signature only; that it was without the scope of authority of respondent's agent to bind the company by signing bills of lading containing any false statements; that such bills described the shipments accurately, stated their weight correctly and that the shipments were carried through to destination promptly and were fully delivered to the order of petitioner at destination.

"Fifth: That had petitioner awaited the arrival of the shipments at destination before taking up the drafts he would have been fully informed of the original points of origin of the shipments in Idaho and the dating of the Ogden, Utah, bills by notations on the statements for freight charges which would have been presented to him for payment in the usual course. That in any event the petitioners should have been warned of the probability of misdating of the Denver bills by reason of the late arrival of the bills of lading and shipments.

"Sixth: That the petitioner failed to take any precautions whatever to keep down the amount of damages,

he alleged he sustained, by a prompt sale of the shipments on prevailing markets."

Petitioner filed (Tr., p. 12) a general demurrer and a special demurrer to the third, fourth, and fifth paragraphs of respondent's answer, which demurrers were by the trial court overruled (Tr., p. 2). Petitioner thereupon elected to stand upon his demurrers and judgment was rendered against him for costs (Tr., p. 2). He thereupon appealed to the Supreme Court of Kansas, which held the demurrers were properly overruled as to all of the defenses set up in respondent's answer, and (Tr., p. 15) affirmed the judgment rendered by the trial court (113 Kan. 726). The Kansas Supreme Court after holding specifically that the defense set up in the fourth paragraph of respondent's answer was good, used the following language with reference to the other defenses set up (Tr., p. 16):

> "The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. *The scope of the powers of defendant's agent at Denver could not be determined by demurrer;* and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

Petition for a rehearing (Tr., p. 20) was thereafter filed, which petition was overruled on the 10th day of July, 1923 (Tr., p. 25).

On the 8th day of October, 1923, petitioner filed petition for writ of certiorari, which was granted November 26, 1923 (Tr., p. 27).

The only ruling of the state courts complained of is that with reference to the fourth paragraph of respondent's answer, although the appellate court below also specifically held the other defenses set up were not demurrable.

POINTS RELIED UPON BY RESPONDENT.

I.

Assuming that the Pomerene Bill of Lading renders a carrier liable for damages resulting from the misdating of bills of lading, there was presented by respondent's answer defences in no way involving a Federal question and raising issues of purely local pleading and practice, broad enough to maintain the judgment of the state court. These points are as follows:

(a) That under the terms of the contract between petitioner and the Ed Past Grain Company, from whom he purchased the misdated bills of lading, petitioner was bound to accept the shipments regardless of the dates of the bills of lading, no allegations being made by petitioner that any notice of cancellation was given the Ed Past Grain Company prior to the time of shipment.

(b) That it was without the scope of the authority of respondent's agent to bind the company by signing bills of lading containing any false statement.

(c) That by reason of the lateness of the delivery of said shipments respondent was or should have been warned of the probability of the fraud of the Ed Past Grain Company prior to his payment of the drafts.

II.

Assuming that the Pomerene Bill of Lading Act renders a carrier liable for damages resulting from the misdating of bills of lading, there being a denial by the respondent of any notice, actual or constructive, of petitioner's contract, upon which he predicates damages, the only damages which could be recovered are general, and there is no allegation of general damages in the petition.

III.

The Pomerene Bill of Lading Act (39 Stat. L. 538) imposes no liability upon a carrier for damages resulting from the misdating of bills of lading, and it was therefore without the scope of the authority of the defendant's agent to issue the bills of lading containing incorrect dates.

ARGUMENT

I.

Assuming that the Pomerene Bill of Lading Act renders a carrier liable for damages resulting from the misdating of bills of lading, there was presented by respondent's answer defences in no way involving a Federal question and raising issues of purely local pleading and practice, broad enough to maintain the judgment of the state court.

It is settled in this court, by a long line of cases, that unless the Federal question presented is necessary to a decision, this court will not review the judgment of a state supreme court. As stated in *Hammond v. Johnston*, 142 U. S. 73, at page 78:

> "It is well settled that where the Supreme Court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. Hopkins v. McLure, 133 U. S. 380; Hale v. Akers, 132 U. S. 554; Henderson Bridge Co. v. Henderson City, 141 U. S. 679."

Below are the points of purely state law upon which the decision of the Supreme Court of Kansas can be rested without in any way involving the Federal question:

(a) Under the terms of the contract between petitioner and the Ed Past Grain Company, from whom he purchased the misdated bills of lading, petitioner was bound to accept the shipments regardless of the dates of the bills of lading, no allegations being made by petitioner that any notice of cancellation had been given the Ed Past Grain Company prior to the time of shipment.

The contract between the petitioner and the Ed Past Grain Company (Tr., p. 14) provided that "grain not shipped within specified time, contract will be considered open until shipped, unless we have been advised the same has been cancelled."

Petitioner did not allege that he had prior to the time of shipment cancelled the contract. Upon this matter the

Kansas Supreme Court said "the fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action."

(b) It was without the scope of the authority of respondent's agent to bind the company by signing bills of lading containing any false statement.

The petition alleges "that said four bills of lading were signed by F. B. Choate, Assistant General Freight Agent of defendant company, the scope of whose authority included the issuing of bills of lading for defendant for transportation in interstate commerce." The answer, after denying generally the allegations of the petition, states (Tr., p. 10) "that it was without the scope of the authority of defendant's agent to sign bills of lading containing any false or erroneous statements."

Upon this point the Kansas Supreme Court said "the scope of the powers of the defendant's agent at Denver cannot be determined by demurrer." That this is true would appear too clear for argument, for the Pomerene Bill of Lading Act, Section 22, requires, as a condition of holding the carrier liable, that the bill of lading shall have been issued on the carrier's behalf "by an agent or employe, the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor."

At this point it should also be noted that the agent must have authority, actual or apparent, not only to *issue bills of lading,* but *to receive goods for transportation,* and there is no allegation in the petition that the agent charged with the misdating of the bills of lading had authority to receive goods on behalf of the respondent.

(c) By reason of the lateness of the delivery of said shipments respondent was or should have been warned of the probability of the fraud of the Ed Past Grain Company prior to his payment of the drafts.

As alleged in the petition, these bills of lading bore dates October 25, 1920, November 2, 1920, and November 5, 1920, whereas they were in fact not issued at Denver until November 22, 1920. In the nature of things, therefore, these shipments did not and could not arrive at destination within a reasonable time from the dates of the governing bills of lading. Assuming that they moved with the utmost expedition, they necessarily showed delays of from 17 to 29 days, and therefore respondent in the fifth paragraph of its answer alleged that by reason of the lateness of the delivery of said shipments the petitioner was, or should have been, warned of the fraud prior to the payment of the drafts. This allegation of the answer stands admitted by the demurrer; therefore, if it be true that the petitioner knew of the fraud, he could not pay said drafts and hold the carrier responsible for damages which he himself might have avoided. This involves strictly a question of fact which could not be disposed of by demurrer. Upon this point the Kansas Supreme Court said (Tr., p. 19):

> "The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and *neither could the matters pleaded in the fifth paragraph of the answer* * * *"

II.

Assuming that the Pomerene Bill of Lading Act renders a carrier liable for damages resulting from misdating of bills of lading, there being a denial by the respondent of any notice, actual or constructive, of petitioner's contract, upon which he predicates damages, the only damages which could be recovered are general, and there is no allegation of general damages in the petition.

The damages alleged to have been sustained by the petitioner consist in the difference between $2.40 per bushel, the contract price at which petitioner agreed to deliver to

his vendee, and the price he finally received, $1.72½ per bushel. This contract of sale is set out in the petition as Exhibit B (Tr., p. 14). Respondent's answer admits this contract, but specifically alleges "that no notice was at any time given to the defendant (respondent) herein by any one of the purpose for which said shipments were made, nor was it (respondent) ever advised of the terms of any contract to be fulfilled upon the arrival of said shipments at destination, which contracts are now claimed by the plaintiff (petitioner) to have been in existence at the time as shown by these Exhibits A and B."

It is respectfully submitted that the sole damages claimed by the petitioner and upon which he predicates his entire cause of action are special, and in order to support a recovery, knowledge thereof, either actual or constructive, must be brought home to the respondent (10 Corpus Juris, Sec. 468, page 324). Respondent's denial of knowledge of the special contract must, upon a demurrer to the answer, be taken as true, and there being an entire absence from the petition of any allegations of general damages to support recovery in any amount, the judgment of the trial court in favor of the defendant for costs was entirely proper. The only liability of the carrier for general damages, predicated upon a misdating of the bills of lading, would be for delay in transit. Manifestly these damages would simply be for a decline in the market, the basis for which would be the difference between the market value of the wheat at the time it should have arrived, had it left Denver on the dates of the bills of lading, and the time it did arrive. But there is no allegation whatever as to the market value of the wheat at the time it arrived at destination, or at the time it should have arrived. From aught that appears in the record the market value may have been greater when it arrived than when it should have arrived. From allegations in the answer it appears that there were times after its arrival and before its sale when the wheat could have been sold on the market by the plaintiff at a price equal

to, and often in excess of the contract price agreed upon between the plaintiff and the Gladney Milling Company (Tr., p. 11). Furthermore, there is an entire absence of allegations in the petition of any damages other than the special damages growing out of the contract between the petitioner and his vendee, the existence of which contract was unknown to the respondent.

Under the Kansas practice where a demurrer is lodged against an answer because of failure to state facts sufficient to constitute a defense, the demurrer searches the record, and should be carried back and sustained as to the petition, in case the allegations of the petition are insufficient to constitute a cause of action or uphold a judgment for relief sought *Johnson v. Wynne et al,* 64 Kan. 138.

Petitioner further alleges (Tr., p. 3) "that according to the usage and custom of the grain business, well-known to defendant, * * * time of shipment of grain in car lots is determined by the date appearing on the bills of lading * * * *". The answer of the respondent after denying generally the allegations of the petition, alleged that "defendant * * * had no knowledge of any kind and did not by any custom or usage know * * * that reliance was being placed on the dates of the bills of lading as determining the rights of the consignors of said shipment." This allegation of respondent stands admitted by the petitioner's demurrer; and, as the Kansas Supreme Court so aptly puts it (Tr., p. 19), "whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice, or was bound to take notice, was also a question of fact and therefore not demurrable." At least, it would render the damages special, and require notice to the carrier that in this particular case reliance was being placed by petitioner upon the dates of the bills of lading.

III.

The Pomerene Bill of Lading Act (39 Stat. L. 538) imposes no liability upon a carrier for damages resulting from the misdating of bills of lading, and it was therefore without the scope of the authority of the defendant's agent to issue the bills of lading containing incorrect dates.

As to petitioner's contention that Section 22 of the Pomerene Bills of Lading Act imposes liability, a reading of that section discloses the fallacy of such an argument. It is as follows:

> "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States * * *, the carrier shall be liable to * * * (b) the holder of an order bill, who has given value in good faith, for damages caused by the *non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof* in the bill at the time of its issue."

Petitioner contends that the words "description of the goods" includes the dating, but as the Kansas Supreme Court so aptly puts it:

> "It would be an undue extension of the statutory words 'description of the goods' to say that the date of shipment of the goods as shown by the bill of lading is part of the description. A description of a carload of goods is a statement or recital of their character, of their sort, kind or species."

That Federal Courts will not broaden the scope of the act by construction is indicated in *Leigh Ellis Co. v. Payne, Agent*, 274 Fed. 443, where it was held:

> "Under Bills of Lading Act, Aug. 29, 1916, Sec. 20 (Comp. St., Sec. 8604jj), where a carrier loads package freight, like cotton in bales, it is required to state in the bill of lading only the number of packages and such

> marks or description as will serve to identify them, and a further statement in an order bill for baled cotton of the weight of the shipment is voluntary and gratuitous, and where qualified by the words 'subject to correction' does not render the carrier liable to a holder of the bill under section 22 for a shortage in the weight."

The latter part of sub-section (b) of section 22 is the vital portion of the act and states specifically that the carrier's liability shall be "for damages caused by non-receipt by the carrier of all or part of the *goods* or their failure to correspond with *the description thereof* in the bill of lading at the time of its issue." Congress by thus specifically defining the liability of a carrier issuing an order bill of lading clearly intended that there could be no further liability. "Expressio unius est exclusio alterius," and where a Federal statute is thus not ambiguous there is no room for construction *(U. S. v. Wiltberger,* 5 Wheat. 77, 95, 96). Nor can its plain words be supplanted by speculation concerning the policy of Congress *(Bate Refrigerating Co. v. Sulzberger,* 157 U. S. 1, 36, 37).

The congressional record conclusively shows the Pomerene Bills of Lading Act was passed by the Senate prior to the time the decision in the Harold case, 241 U. S. 371, was handed down by this court, and a search of the cases decided prior to the passage of the Pomerene Act fails to disclose a single instance of damage sustained as the result of misdating.

A reference to Section 21 of the Pomerene act indicates clearly that the words "description of the goods" was used advisedly. That paragraph deals with package and bulk freight and contemplates that the shipper may designate upon the bills of lading that the goods are "of a certain kind or quantity or in a certain condition," and, under certain circumstances therein enumerated, permits the carrier to relieve itself from the duty of ascertaining the correctness of these statements by endorsing upon the bill of lading

the words "shippers weight, load and count," and then provides that if that endorsement be true "the carrier shall not be liable for damages caused * * * by the non-receipt or by mis-description of the goods." It will not be urged that the date of shipment was within the intention of Congress when it used the words "mis-description of the goods" in this section. Manifestly the words relate to kind, quantity and condition, and there is not the slightest reason for assuming that any other meaning was intended by the words "description of the goods" when used in Section 22.

All of the cases cited by the petitioner, wherein the courts have dealt with the Pomerene Act and have stated the intention of Congress to be to make bills of lading negotiable, were cases in which there was no occasion to differentiate between full negotiability and partial negotiability. This court, however, in *Pere Marquette Ry. v. French,* 254 U. S. 538, was careful to state that the "Pomerene Bill of Lading Act extended to bill of lading *certain characteristics* of negotiable paper" and "*attributes* of commercial paper."

Had it been the intention of Congress to impress upon carriers liability for damages growing out of misdating of bills of lading, it is respectfully suggested that the obvious method would have been to have made the carrier liable for all recitations of the bill of lading and not merely for non-receipt and mis-description of the goods.

Petitioner in his petition here and in his brief sets up many reasons why the obiter dictum holding of the Kansas Supreme Court on the Federal question contended for should be reviewed by this court, relative to the customs of grain dealers and milling companies in making and receiving consignments of wheat on shipper's order bills of lading. Also many assertions of fact are made relative to the reliance placed upon the dating of order bills of lading. However, as judgment below was based entirely upon a finding as to the adequacy of the pleadings, such facts and illustrative

situations presented by petitioner are entirely outside of the record. Citations of authority to the effect that this court will only consider matters properly presented by the record before it are unnecessary and statements of counsel are therefore ineffective.

Having demonstrated that the Pomerene Bill of Lading Act has no applicability to the misdating of bills of lading, it is clear that the case falls squarely within the decision of this court in the case of *Atchison, etc., R. R. Co. v. Harold,* 241 U. S. 371, in which it was held "that the local rule (investing the purchaser of a bill of lading with greater rights than those enjoyed by the shipper or the one from whom he acquired the bill) applied by the court below was in direct conflict with the general commercial law on the subject as repeatedly settled by this court, is plain .*(Shaw v. Railroad Co.,* 101 U. S. 557; *Pollard v. Vinton,* 105 U. S. 7; *Iron Mountain Ry. v. Knight,* 122 U. S. 79; *Friedlander v. Tex. & Pac. Ry.,* 130 U. S. 416; *Mo. Pac. Ry. v. McFadden,* 154 U. S. 155; *The Carlos F. Roses,* 177 U. S. 655, 665.)"

It is respectfully submitted that the judgment of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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